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Supreme Court, U.S.
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No. 09-09-509

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In The

Supreme Court of the United States

JUDY JONES,

Petitioner,

v.

VIRGINIA ANDREWS BURDETTE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in according absolute deference to a Bankruptcy Court's internally inconsistent factual findings contrary to the clear error standard set forth in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Judy Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is unreported. App.1. Its denial of rehearing is unreported. App.35. The order from the Ninth Circuit Bankruptcy Appellate Panel is unreported. App.4. The relevant order and judgment of the District Court is unreported. App.20, 24.

JURISDICTION

The Ninth Circuit issued its decision on April 3, 2009, and denied a timely petition for rehearing on June 25, 2009. App.35. Petitioner sought and received an extension of time to file the petition from Justice Kennedy – who granted the extension to file until October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 11, United States Code, Section 547(b) reads:

> Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made – (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if – (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

STATEMENT

This case is about the amount of deference afforded to trial courts when determining whether a debtor is insolvent. At a trial to determine whether Theodore Prince's ("debtor") transfer of $7,500.00 was an avoidable preference, the trial judge completely disregarded evidence tending to show that debtor was solvent at the time the payment was made. The court of appeals upheld the judgment, summarily reviewing

the trial court's ruling and concluding that no error was made.

Under the court of appeals' view, district court factual findings are sacrosanct. Indeed, the court of appeals conducted only a rudimentary review of the evidence admitted during the bankruptcy trial and accorded almost unlimited deference despite the clear error of the lower court's factual findings. The court of appeals' standard of review is contrary to at least two decades of decisions from this Court holding that while a trial judge's factual findings are accorded substantial deference, those findings are not beyond reproach. The Court should grant the writ to remind the court of appeals that even trial court factual findings are reviewable on appeal.

1. This case involves the issue of whether a transfer of $7,500.00 from a bankruptcy debtor to the petitioner was an avoidable preference within the meaning of the Bankruptcy Act, 11 U.S.C. § 547(b). Under the Act, any transfer of property is subject to review by a trustee. A trustee may avoid certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition. The trustee's power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps reduce

"the incentive to rush to dismember a financially unstable debtor." *In re Smith*, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), *cert. dismissed sub nom., Baker & Schultz v. Boyer*, 506 U.S. 1030 (1992).

Not all debtor transfers of property in the months leading up to filing a bankruptcy petition are covered under the Act. Indeed, section 547(b) provides that a trustee may only avoid a transfer of a debtor interest in property if the transfer meets five requirements: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code.

The trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g). The Bankruptcy Act presumes a debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); *see also, Union Bank v. Wolas,* 502 U.S. 151, 155 (1991). This presumption requires the defendant to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). *See In re*

Taxman Clothing Co., Inc., 905 F.2d 166, 168 (7th Cir. 1990).

Generally, a trustee proves that a debtor was insolvent when the challenged transfer was made by comparing the debtor's liabilities on the balance sheet against the debtor's assets. For example, if a debtor's liabilities were more than the assets at the time of the transfer, the debtor is considered insolvent at the time of the transfer. Also, if the trustee is able to prove that the recipient of the transfer received more on account of the challenged transfer than it would have recovered in a Chapter 7 liquidation, the transfer is an avoidable preference.

2. The debtors, Theodore Jacob Prince and Donna Marie Prince, filed a petition for Chapter 7 bankruptcy on January 3, 2001. The Bankruptcy Court in Seattle, Washington, appointed Virginia Burdette trustee of the bankruptcy proceedings.

Petitioner Judy Jones (debtor Theodore Prince's sister) loaned debtors $7,000.00 on or around October 11, 1999, because debtors were starting a business buying heavy equipment and selling the parts. Petitioner's husband, Jerry Jones, also loaned the debtors $8,000.00.

The debtors repaid Jerry Jones $8,500.00 on May 15, 2000, but were unable to pay petitioner until June 12, 2000. The $7,500.00 check to petitioner cleared the bank on June 26, 2000, which is significant, given that avoidable preferences are determined based

upon the date the check is honored by the bank. *Barnhill v. Johnson*, 503 U.S. 393, 394 (1992).

The trustee began adversarial proceedings against petitioner and her husband to recover loan repayments on January 28, 2002. Trustee argued that the payments were preferential transfers under § 547(b) and § 550. During the course of the adversary proceedings, a district court reversed the findings of the Bankruptcy Court, concluding that the debtors were solvent when payment was made to petitioner's husband. Thus, the only issue left to determine was whether the debtors were solvent on June 26, 2000 – the day the check payable to petitioner was honored by the bank.

The Bankruptcy Court conducted a trial where the trustee presented the testimony of Michael Peters – a realtor who addressed the value of the debtors' real property. Mr. Prince testified in support of the petitioner and stated that the Bankruptcy Court should include furniture as personal property assets and tools as part of his business inventory.

The Bankruptcy Court issued an oral ruling at the conclusion of trial. The Court determined that the value of the debtors' property at the time of the transfer was $245,000.00. App.31. However, the court later held that "the value of Debtors' residence on June 26, 2000 was $265,000.00." App.21.

In addressing Theodore Prince's testimony regarding personal property and tool inventory, the court rejected it completely. The court stated:

> The debtor's testimony concerning inventory is, at best, murky. He doesn't have any idea of what the inventory is. We go through this stuff about it being stolen later on. He first testified that normally it's not customary within the business that he was doing to have inventory. Then he testified that some of it was sold, and then he testified that it was stolen. None of this I find to be credible evidence. And I'm not going to allow anything for inventory. As far as personal property is concerned, the debtors listed the amount that he has [on his schedules]. He doesn't schedule [the furniture] anyway, but even if he did, there's a reduction in value. The whole thing with the tools is a mystery to me. I know he says he paid $1,300 for tools. Again, his evidence concerning what he had, his personal knowledge is that he had a physical condition involving a stroke, he hasn't got a clue. And so I simply cannot allow that.

App.31-32.

The Bankruptcy Court issued supplemental findings of fact and conclusions of law that calculated the debtors' liabilities on June 26, 2000, at $282,035.99. The court calculated the total assets at $281,399.86. Therefore, the court concluded that debtors were insolvent by $616.13 at the time of the transfer and the $7,500.00 check was an avoidable preference. The court then entered a judgment against petitioner.

In a motion for reconsideration, petitioner argued that the debtors' liabilities should have been reduced

for a check sent to creditors that cleared the bank on June 19, 2000. Petitioner also argued that debtor's testimony could not reject in its entirety by the Bankruptcy Court in calculating debtors' assets. But the court denied the motion in a one-page order. App.27.

3. The United States Bankruptcy Appellate Panel of the Ninth Circuit reviewed the Bankruptcy Court's finding that debtor was insolvent on the date the $7,500.00 transfer was made to petitioner. The court first noted the highly deferential standard of review for findings of insolvency. App.11. The court concluded that while the lower Bankruptcy Court had rejected Theodore Prince's testimony in its entirety, the finding was not clearly erroneous even though the Bankruptcy Court had not specifically found that either the inventory or tools did not exist. App.15-16. The court also held that the Bankruptcy Court had not abused its discretion in denying the motion for reconsideration. Although the invoices tending to show that debtor had at least $6,850.00 of inventory were produced at trial, the court believed that it was immaterial as to whether the debtors were insolvent. App.16.

A panel of the Ninth Circuit also reviewed the Bankruptcy Court's avoidable preference finding. But the Court did so summarily without benefit of oral argument. The Court agreed that the factual findings by the lower court did not amount to clear error, but the court issued no analysis – only a one-sentence conclusion.

A petition for rehearing was filed, but the Ninth Circuit denied the motion on June 25, 2009.

Justice Kennedy granted an extension of time until October 23, 2009, for the filing of the petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD ISSUE

The court of appeals' decision was erroneous for two reasons. First, it confused a clearly erroneous with a never erroneous standard for reviewing factual findings made by a Bankruptcy Court. Contrary to the court of appeals, this Court has always made clear that while factual findings are reviewed deferentially, they are not above all review. Second, the court of appeals failed to justify the Bankruptcy Court's internally inconsistent findings that while the debtors possessed personal property and inventory, the court could not determine the value of the personal property and inventory. Because the court of appeals' decision runs counter to well-established decisions from this Court and those below, the Court should grant the writ and summarily reverse the judgment.

The standard for appellate review of trial court factual findings has been covered by this Court many times. The Court has made clear that when an appellate court reviews factual findings, the review is for "clear error." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *see also*, *Wainwright v. Witt*, 469 U.S.

412 (1985). Although the meaning of the phrase "clearly erroneous" was for some time not immediately apparent, certain general principles can be derived from the Court's cases. *Anderson,* at 574.

Clear error review permits only limited reexamination of factual findings where "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 573-74. The reviewing court may reverse, however, when, although there is evidence to support the finding, "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

While trial court's credibility determinations are accorded even greater deference, they are not beyond review. In fact, a trial court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Anderson*, 470 U.S. at 575. Thus, reviewing for clear error allows an appellate court to examine the trial court's credibility determinations in light of the evidence in the record as a whole, in order to determine whether the credibility assessment can be reconciled with other evidence: "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it." *Id.*

Courts have found a district court's factual findings to be clearly erroneous where the court has failed to synthesize the evidence in a manner that accounts for conflicting evidence or the gaps in a party's evidentiary presentation. Thus, courts have reversed factual findings where the trial court incorrectly assessed the probative value of various pieces of evidence, leading it to rely on speculation, *see House v. Bell*, 547 U.S. 518, 528 (2006), and where the court failed to weigh all of the relevant evidence before making its factual findings, *see Ortega v. Duncan,* 333 F.3d 102, 107 (2d Cir.2003). Moreover, courts have found the trial court's credibility determinations vulnerable where they were founded on factual inferences that the evidence did not permit. *See Krizek v. Cigna Group Ins.*, 345 F.3d 91, 100-01 (2d Cir.2003); *accord Jiminez v. Mary Washington College,* 57 F.3d 369, 380-81 (4th Cir.1995) (reversing district court's discrediting of five semesters of students' assertions against a professor denied tenure as tainted by racial animus and finding that the district court's conclusion of taint was based on speculation and was inconsistent with the other evidence in the record); *Hayes v. Invesco, Inc.*, 907 F.2d 853, 856-57 (8th Cir.1990) (holding that fact findings were clearly erroneous where the district court misinterpreted some evidence and failed to consider some testimony).

Application of the foregoing principles to the facts of this case lay bare the errors committed by the court of appeals in its employment of the clearly erroneous standard. The court treated the factual findings as if

they were beyond reproach. Instead of actually reviewing the factual findings, the court of appeals simply stated that the lower court did not "clearly error by relying on the bankruptcy schedules, rather than Mr. Prince's testimony, to determine the value of Prince's personal property." App.2.

To be sure, factual findings are reviewed deferentially, but *some* review must be conducted. By failing to review the evidence as a whole, the court of appeals also failed to conduct the review required by this Court's cases. And had the court of appeals conducted the proper review, it would have found that the Bankruptcy Court's factual findings were internally inconsistent – a paradigmatic example of clear error. *Anderson*, 470 U.S. at 575.

The Court should grant review to remind the court of appeals that trial factual findings are not sacrosanct – trial courts are no more infallible than reviewing courts, even when making factual determinations.

2. The court of appeals also failed to review the Bankruptcy Court's internally factual findings. After Prince had testified at trial, the Bankruptcy Court concluded that Prince had some additional personal property and inventory. App.32. Nevertheless, the Bankruptcy Court also concluded that Prince's testimony was so "murky" that the court could not determine the amount of the personal property and inventory. The court therefore relied solely upon the bankruptcy schedules.

The Ninth Circuit Bankruptcy Panel acknowledged the Bankruptcy Court's internally inconsistent reasoning. The Panel stated that "the bankruptcy court did not specifically find that either the inventory or tools did not exist. Rather, the court found that Ted's testimony regarding the tools and inventory was not credible." App.32. The Panel also acknowledged that the Bankruptcy Court had a statement in the record showing that debtors possessed $5,000.00 in inventory on the transfer date. App.15. Yet, the Panel concluded that the Bankruptcy Court did not clearly err when it decided to disregard the testimony on personal property and inventory.

The Bankruptcy Court attempted to shield its bogus factual findings under the umbrella of a credibility determination. But this Court has emphasized that trial courts may not "insulate [their] findings from review by denominating them credibility determinations. . . ." *Anderson*, 470 U.S. at 575. Where trial court credibility determinations are internally inconsistent with the rest of the factual findings, clear error has occurred. *Id.* The court of appeals therefore erred in allowing an internally inconsistent factual finding to stand, because the Bankruptcy Court simply could not conclude that debtors possessed personal property and inventory, but fail to add the property and inventory to the calculation of solvency.

3. Had the court of appeals actually reviewed the Bankruptcy Court's factual findings for clear

error, the result of the insolvency finding would have been different.

Disregarding the debtors' testimony on personal property and inventory, the Bankruptcy Court determined that debtors' liabilities exceeded their assets by $613.13 when the transfer to petitioner occurred. If the court had attributed just the $5,000.00 record of inventory that was corroborated by debtor's testimony, the debtors were solvent at the transfer date. And if the Bankruptcy Court believed inventory was possessed, there was unquestionably enough inventory to cover the $613.13 difference between solvency and insolvency. Ultimately, if the debtors were solvent at the time of the transfer, the transfer was not an avoidable preference.

4. The Court's use of its summary disposition is warranted in this case. Under 28 U.S.C. § 2106, this Court has broad authority to grant summary disposition. In a case such as this one, summary disposition "conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*citing United States v. Johnson,* 457 U.S. 537, 555, n. 16 (1982)).

It is clear that the court of appeals did not consider this Court's precedents (such as *Anderson*) when reviewing petitioner's claim of factual finding of clear error. It is also clear that the court of appeals' opinion gave short thrift review of the issue. If the Court is to reach the merits of the case, it would be better to have the benefit of full review by the court of appeals, rather than a one-sentence analysis. Thus, the Court should summarily reverse the lower court judgment and remand the case for a more comprehensive opinion. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

The court of appeals' opinion was a one-sentence statement that the Bankruptcy Court's factual findings were not clearly erroneous. But those findings were not reviewed in accordance with this Court's directives. Had the court of appeals faithfully applied clear error review there is no question that the Bankruptcy Court's internally inconsistent factual findings were in error. And that error affected the ultimate outcome on whether the debtors' transfer constituted an avoidable preference. The Court's review is needed to correct a manifest miscarriage of justice by the lower courts.

CONCLUSION

For the reasons above, the Court should grant the writ of certiorari.

Respectfully submitted,

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321 Fed.Appx. 599

United States Court of Appeals,
Ninth Circuit.
In the Matter of:
Theodore Jacob PRINCE; Donna Marie Prince,
Debtors,
Judy Jones, Appellant,
v.
Virginia Andrews Burdette, Chapter 7 Trustee,
Appellee.
No. 07-35149.

Submitted March 18, 2008.*
Filed April 3, 2009.

Judy Jones, Mather, CA, pro se.

Krista L. White, Esq., Bishop, White, Miersma, & Marshall PS, Seattle, WA, for Appellee.

Appeal from the Ninth Circuit, Bankruptcy Appellate Panel, Pappas, Montali, and Smith, Bankruptcy Judges, Presiding. BAP No. WW-06-01181-PaMoS.

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

MEMORANDUM**

Judy Jones appeals pro se from the Bankruptcy Appellate Panel's ("BAP") decision affirming the bankruptcy court's determination that debtors Theodore and Donna Prince were insolvent at the time they transferred $7,500 to Jones, and, thus, the transfer was an avoidable preference. We have jurisdiction pursuant to 28 U.S.C. § 158(d). We review the decision of the BAP de novo, the bankruptcy court's factual findings for clear error, and the bankruptcy court's ruling on a motion for reconsideration for an abuse of discretion. *Arrow Elecs., Inc. v. Justus* (*In re Kaypro*), 218 F.3d 1070, 1073 (9th Cir.2000). We affirm.

The bankruptcy court did not clearly err by relying on the bankruptcy schedules, rather than Mr. Prince's testimony, to determine the value of the Princes' personal property. *See Rifino v. United States* (*In re Rifino*), 245 F.3d 1083, 1086 (9th Cir.2001) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (internal quotation marks omitted). Because the Princes' liabilities were greater than the value of the Princes' home and personal property at the time of the transfer, the bankruptcy court did not clearly err in finding that the Princes were insolvent. *See* 11 U.S.C. § 101(32)(A) (defining

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** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

insolvency as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property").

The bankruptcy court did not abuse its discretion in denying Jones' motion for reconsideration because the evidence presented to the court was available at the time of the trial and, in any event, did not affect the Princes' liability and asset valuations enough to change the insolvency finding. *See Far Out Prods. v. Oskar,* 247 F.3d 986, 997-98 (9th Cir.2001) (explaining that under Fed.R.Civ.P. 59(a) the appellant must show that new evidence could not have been discovered sooner through the exercise of reasonable diligence and would likely have changed the outcome of the case); *see also* Fed. R. Bank. P. 9023 (applying Rule 59 to bankruptcy cases).

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: THEODORE PRINCE and DONNA PRINCE, Debtors.	BAP No. WW-06-1181-PaMoS Bk. No. 01-10030 Adv. No. 02-01071
JUDY JONES, Appellant, v. VIRGINIA A. BURDETTE, Chapter 7 Trustee, Appellee.	**MEMORANDUM**[1]

Argued and Submitted on November 16, 2006, at Seattle, Washington

Filed – January 25, 2007

Appeal from the United States Bankruptcy Court for the Western District of Washington

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see* Fed. R. App. P. 32.1), it has no precedential value. *See* 9th Cir. BAP Rule 8013-1.

Honorable Thomas T. Glover,
Bankruptcy Judge, Presiding.

Before: PAPPAS, MONTALI and SMITH, Bankruptcy Judges

The bankruptcy court determined that the transfer of $7,500 from debtors to an insider-creditor made within a year of filing their petition when they were insolvent was an avoidable preference pursuant to § 547(b)[2], and thereafter denied the insider-creditor's motion for reconsideration. The creditor appealed both rulings. We AFFIRM.

FACTS

Debtors Theodore Jacob Prince ("Ted") and Donna Marie Prince ("Donna") filed a petition for relief under chapter 7 of the Bankruptcy Code on January 3, 2001. Virginia Burdette ("Trustee") was appointed trustee.

On October 11, 1999, Judy Jones ("Appellant"), Ted's sister, loaned Debtors $7,000. On October 12, 1999, Jerry Jones ("Jerry"), Appellant's husband and

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

Debtors' brother-in-law, loaned Debtors $8,000. Debtors paid Jerry $8,500 on May 15, 2000; the check cleared the bank on May 19, 2000. Debtors paid Appellant $7,500 on June 12, 2000; that check cleared on June 26, 2000 ("Transfer Date").[3]

On January 28, 2002, Trustee commenced an adversary proceeding against Appellant and Jerry to recover the loan payments as preferential transfers pursuant to §§ 547(b) and 550.[4] The adversary proceeding came on for trial in the bankruptcy court on August 14, 2003. Based principally on the testimony of Trustee's accountant, the bankruptcy court determined that the Debtors were insolvent on and after May 14, 2000. Thus, the bankruptcy court ruled that the payments to Appellant and Jerry were avoidable preferences. Findings of Fact, Conclusions of Law and Judgment were entered on December 19, 2003.

Appellant, on her own behalf and that of Jerry, appealed the Judgment on January 2, 2004. The appeal was heard in the U.S. District Court for the Western District of Washington. During the course of the appeal, Trustee conceded that the transfer to Jerry was made when the Debtors were solvent.

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[3] The dates the checks cleared the bank are significant here because, for purposes of determining whether an avoidable preference has occurred, the transfer is deemed to take place on the date the check is honored by the bank. *Barnhill v. Johnson*, 503 U.S. 393, 394 (1992).

[4] Appellant and Jerry conceded that they are relatives and insiders as to Debtors as defined in §§ 101(45) & (31).

Thus, the district court reversed the bankruptcy court's determination that the transfer to Jerry was an avoidable preference.

The district court also concluded that Trustee's accountant made an error regarding a stock payment received by Debtors after the payment to Jerry, but before the transfer to Appellant, and that the bankruptcy court had relied on that error in deciding that Debtors were insolvent as of the Transfer Date. Therefore, the district court remanded the action to the bankruptcy court for additional proceedings to determine whether the transfer to Appellant on the Transfer Date was a preference and avoidable.

On February 6, 2006, the bankruptcy court conducted another trial regarding the alleged preferential transfer to Appellant. Trustee presented the testimony of Michael Peters, a realtor, who addressed the value of Debtors' real property. Appellant called Ted as a witness, who testified, among other things, that the bankruptcy court should include as part of his assets on the Transfer Date certain items of personal property. He also testified about the existence and value of his tools and inventory.

In its oral ruling made at the conclusion of the trial, the bankruptcy court declined to adopt the opinion of Trustee's witness that the value of Debtors' real property was $225,000 on the Transfer Date. Instead, the court determined that the value was $245,000, although the court noted that there was some justification for the higher valuation proposed

by Appellant of $265,000. Tr. Hr'g 46:22-47:21. After trial, Appellant requested that the bankruptcy court review these numbers. The bankruptcy court's Supplemental Findings of Fact and Conclusions of Law, entered April 10, 2006, apparently agreed with Appellant, and found that "the value of the Debtors' residence on June 26, 2006 was $265,000."

Appellant was considerably less successful in persuading the bankruptcy court to accept the testimony of Ted regarding the various personal property assets and values:

> The debtor's testimony concerning inventory is, at best, murky. He doesn't have any idea of what the inventory is. We go through this stuff about it being stolen later on. He first testified that normally it's not customary within the business that he was doing to have inventory. Then he testified that some of it was sold, and then he testified that it was stolen. None of this I find to be credible evidence. And I'm not going to allow anything for inventory. As far as personal property is concerned, the debtors' listed the amount that he has [on his schedules]. He doesn't schedule [the furniture] anyway, but even if he did, there's a reduction in value. The whole thing with the tools is a mystery to me. I know he says he paid $1300 for tools. Again, his evidence concerning what he had, his personal property knowledge is that he had a physical condition involving a stroke,

> he hasn't got a clue. And so I simply cannot allow that.

Tr. Hr'g 47:22-48:16.

The bankruptcy court's Supplemental Findings of Fact and Conclusions of Law summarized the facts regarding the insolvency issue as follows:

- On the Transfer Date, the Debtors' liabilities totaled $282,035.99, consisting of $62,990.34 in unsecured debt and $219,045.65 in secured debt.
- The value of Debtors' real property on the Transfer Date was $265,000.00. The value of cash in Debtors' checking accounts on that date was $13,279.86. The value of Debtors' personal property on the Transfer Date was $3,120.00. The bankruptcy court concluded that Ted's testimony regarding the value of inventory and tools was not credible. Thus, the court determined that the total value of Debtors' assets on the Transfer Date was $281,399.86.
- On the Transfer Date, Debtors' liabilities exceeded their assets by $616.13 and Debtors were insolvent on that date.[5]

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[5] The Panel notes that the difference between total liabilities of $282,035.99 and total assets of $281,399.86 is $636.13, a difference of $20 from the $616.13 stated in the Supplemental Findings of Fact. We believe this is a typographical error and harmless error on three grounds. First, we have examined the record and all other values listed for assets and liabilities are correct. Second, at the hearing, the court correctly calculated the difference at $636.13 (after allowing for an adjustment in the

(Continued on following page)

Based upon these findings of fact and other evidence, the bankruptcy court concluded that the payment to Appellant was an avoidable preference. Tr. Hr'g 49:5-6. A judgment was entered on April 10, 2006.

On April 19, Appellant filed a motion for reconsideration pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. Appellant challenged the bankruptcy court's findings and conclusions concerning the personal property, and in particular, its refusal to consider the value of the tools and inventory allegedly in Debtors' possession on the Transfer Date.[6] The bankruptcy court denied the motion by order entered April 27, 2006. Appellant filed this timely appeal of the judgment and the order denying the motion for reconsideration on May 2, 2006.

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real estate value). Tr. Hr'g 43:22. Third, a $20 error in computation of insolvency is immaterial when the liabilities exceed assets by over $600; to the extent that it has any effect at all on the computation, it increases the amount of insolvency.

[6] In the reconsideration motion and in this appeal, Appellant also faults the bankruptcy court for its failure to reduce Debtors' liabilities by $500 based upon a check allegedly sent by Debtors to Key Bank on June 16, 2000, which cleared Debtors' account on June 19, 2000. However, whether such a payment should be credited to Debtors' liabilities will not impact the ultimate resolution of the issues, since a reduction of debts in excess of $617 would be required to render the Debtors solvent. Instead, the critical issues on appeal involve whether Debtors' assets were properly valued by the bankruptcy court.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(a) and (b)(2)(F). We have jurisdiction pursuant to 28 U.S.C. § 158(b).

ISSUES

1. Whether the bankruptcy court clearly erred in finding that Debtors were insolvent at the time of the transfer of $7,500 to Appellant.

2. Whether the bankruptcy court abused its discretion in denying Appellant's motion for reconsideration.

STANDARD OF REVIEW

Whether a debtor is insolvent for purposes of § 547 is a question of fact. *Sierra Steel, Inc. v. Totten Tubes, Inc.* (*In re Sierra Steel, Inc.*), 96 B.R. 275 (9th Cir. BAP 1989). We review the bankruptcy court's findings of fact for clear error and we must give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses. FED. R. BANKR. P. 8013; *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985); *Welther v. Donnell* (*In re Oakmore Ranch Mgmt.*), 337 B.R. 222 (9th Cir. BAP 2006). Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie,* 532 U.S. 234, 242 (2001).

The denial of a motion for reconsideration is reviewed for an abuse of discretion. *Nunes v. Ashcroft*, 348 F.3d 815 (9th Cir. 2003).

DISCUSSION

I.

The bankruptcy court did not clearly err in finding that Debtors were insolvent at the time of the transfer of $7,500 to Appellant.

The bankruptcy court concluded that the transfer by Debtors to Appellant was an avoidable preference.[7]

---

[7] Section 547(b), specifying the elements of an avoidable preference, provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made –
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if –
>
> (A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.];
>
> (B) the transfer had not been made; and

(Continued on following page)

Appellant argues that the bankruptcy court clearly erred in its finding, required by § 547(b)(3), that Debtors were insolvent on the Transfer Date. Appellant contends the bankruptcy court incorrectly determined the value of the items of personal property allegedly owned by Debtors was $3,120.00, the value Debtors listed in their schedules. In particular, Appellant asserts that the court erred as to three specific findings of fact: (1) That Debtors had no inventory on the Transfer Date; (2) that the tools that Debtors purchased for $1,300 on May 11, 2000, did not exist on the Transfer Date; and (3) that the furniture that Debtors apparently purchased from J.C. Penney on June 14, 2000, was not worth the purchase price.

Under § 547(g), Trustee was required to prove that Debtors were insolvent on the Transfer Date.[8] Section 101(32) defines "insolvent" as a "financial condition such that the sum of [the debtor's] debts is greater than all of such [debtor's] property, at a fair

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(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Appellant apparently concedes, or at least has not challenged on appeal, that all other requirements for a preference have been established in this action, other than that Debtors were insolvent.

[8] Under § 547(f), a debtor is presumed to be insolvent during the 90 days immediately preceding the date of the filing of the petition. Since the transfer to Appellant occurred more than 90 days before Debtors filed their petition, this statutory presumption was unavailable to Trustee.

valuation, exclusive of (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such [debtor's] creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title." This is the so-called "balance sheet test of insolvency." *Merkel v. Comm'r,* 192 F.3d 844, 855 (9th Cir. 1999).

In this case, Trustee has not alleged Debtors made any fraudulent transfers of property, nor does she challenge Debtors' exemptions. Thus, the bankruptcy court need only compare the value of Debtors' assets, net of exemptions, to the amount of their liabilities on the Transfer Date to determine whether Debtors were insolvent. We have reviewed the evidence and transcript of the June 6, 2006 trial, and we conclude that the bankruptcy court did not clearly err in finding, based upon the conflicting evidence, that Debtors were insolvent.

In making its findings, the bankruptcy court could consider Debtors' schedules, which were admitted into evidence without objection. On their schedules, Debtors listed a total of $3,120.00 in personal property assets, but they did not list any tools or inventory, nor did they state that any tools or inventory had been lost or stolen. The schedules also did not list the furniture allegedly purchased from J.C. Penney, which Debtors claimed to still possess on the date of trial. Because they were executed by Debtors under penalty of perjury, the schedules could properly be considered by the bankruptcy court as evidence of Debtors' insolvency. *See In re Mohring,* 142 B.R. 389,

392 (Bankr. E.D. Cal. 1992) ("Since the schedules and lists are executed under penalty of perjury, they may be treated as affidavits that may be used under Federal Rule of Civil Procedure 43(e) for any purpose permitted by the Federal Rules of Evidence.").

On the other hand, the bankruptcy court heard testimony from Ted regarding the existence and value of the tools, inventory, and furniture. But the court characterized Ted's testimony regarding the inventory as "murky" and noted that "[h]e doesn't have any idea of what the inventory is." Tr. Hr'g 47:22-23. The court described the tool issue as a "mystery to me and so I simply cannot allow it." Tr. Hr'g 48:11-16. Concerning the furniture, the bankruptcy court found that no furniture was listed in Debtors' schedules, even though Debtors still claimed to possess the furniture on the hearing date, and that, in any case, used furniture would not be worth the purchase price of new furniture as alleged by Appellant. Tr. Hr'g 48:7-11. The court summed up Ted's testimony as not credible. This credibility finding is entitled to special deference by the appeals court. *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985).

And contrary to Appellant's contention, the bankruptcy court did not specifically find that either the inventory or tools did not exist. Rather, the court found that Ted's testimony regarding the tools and inventory was not credible. No other evidence was offered to the bankruptcy court at trial to show that

Debtors owned any tools or inventory[9] on the Transfer Date.

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Elliott,* 322 F.3d 710, 714 (9th Cir. 2003); *SEC v. Rubera,* 350 F.3d 1084, 1094 (9th Cir. 2003) (holding that if the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appeals court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently). Given the conflict in the evidence, the bankruptcy court did not clearly err when it decided to believe the information in the schedules rather than Ted's testimony.

II.

The bankruptcy court did not abuse its discretion in denying Appellant's motion for reconsideration.

Reconsideration is appropriate if the trial court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *Nunes v. Ashcroft,* 348 F.3d

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[9] There is some indication that the court had a statement in the record that Debtors had $5,000 in inventory on or around the Transfer Date. However, testimony showed that that statement was prepared over two years after the Transfer Date by a bookkeeper without direct knowledge of the inventory.

815, 815 (9th Cir. 2003). Here, the bankruptcy court did not abuse its discretion in declining to reconsider its decision.

Appellant, in both the reconsideration motion and in this appeal, challenges the bankruptcy court's findings on the basis of "manifest error." In the motion for reconsideration, she also points to "newly discovered evidence," specifically invoices, "that were not previously provided in discovery [that] clearly shows that [Ted's] testimony was credible [in] that he had at least $6850.00 in inventory on June 26, 2000."

To establish that a bankruptcy court abused its discretion in denying a motion for reconsideration based upon newly discovered evidence, the movant must show that: "(1) the evidence was discovered after trial, (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case." *Far Out Prods., Inc. v. Oskar,* 247 F.3d 986, 993 (9th Cir. 2001) (citing *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 929 (9th Cir. 2000)). Here, the invoices were not "discovered after trial," but instead were apparently in Debtors' possession. That Debtors acknowledged that they had not provided the invoices in discovery does not obviate the requirement that Appellant show she diligently attempted to obtain the invoices prior to trial. And finally, there is no indication that the information in the invoices, discovered so late in the case, would have changed the outcome of the trial.

Even had the invoices been offered at trial, the bankruptcy court could have declined to accept them in preference to the information in Debtors' schedules.

The remaining assertions in the motion for reconsideration merely rehash Appellant's arguments disagreeing with the bankruptcy court's assessment that Ted's testimony was not credible. As noted above, the bankruptcy court was entitled to assign appropriate weight to the conflicting evidence in deciding whether Debtors were insolvent.

In sum, nothing in the motion for reconsideration shows there was newly discovered evidence, that the bankruptcy court committed clear error or that its ruling was manifestly unjust, nor was there any intervening change in the law. Thus, we conclude that the bankruptcy court did not abuse its discretion in denying the motion for reconsideration.

CONCLUSION

For all the above reasons, we AFFIRM the bankruptcy court's April 10, 2006, judgment and April 27, 2006, order denying reconsideration of the motion.

Honorable Thomas T. Glover
Chapter 7/Adversary
US Courthouse, Courtroom 7106
Trial Date: February 6, 2006

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: THEODORE JACOB PRINCE and DONNA MARIE PRINCE, Debtors,	NO. 01-10030
VIRGINIA BURDETTE, Trustee Plaintiff, v. TEX PRINCE and JANE DOE PRINCE, husband and wife and their marital community, Defendants,	ADVERSARY NO. A02-01071 (Consolidated)
THEODORE JACOB PRINCE and DONNA MARIE PRINCE, Debtors,	

VIRGINIA BURDETTE, Trustee Plaintiff, v. JERRY JONES and JUDY JONES, husband and wife and their marital community, Defendants,	)	ADVERSARY NO. A02-01074 **SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter came on before the Court for trial before the undersigned judge. The plaintiff, Virginia Burdette, Trustee, appeared in person and by and through her attorney of record Krista L. White of Bishop, White, and Marshall. Defendant Judy Jones appeared by and through her attorney of record, Darrel Lahtinen of the Law Offices of Jean Schiedler-Brown. Judgment against the remaining defendants, Martha Prince and Norman "Bud" McCall was entered on December 19, 2003. The Court, having heard the testimony of the parties, and having read and considered the pleadings and exhibits, hereby makes and enters the following:

FINDINGS OF FACT

1. Plaintiff, Virginia Burdette, is the Chapter 7 Trustee of the estate of Theodore Jacob Prince, also known as Ted Prince, and Donna Marie Prince, debtors. The debtors filed a petition for relief under

Chapter 7 of the Bankruptcy Code on January 3, 2001.

2. Defendant Judy Jones is the sister of the debtor Theodore Jacob Prince. Jerry Jones, wife of Judy Jones, is the brother-in-law of the debtor Theodore Jacob Prince.

3. By check dated June 12, 2000, Ted Prince paid to Judy Jones the sum of $7,500.00. The check was paid on June 26, 2000. The payment was on account on an antecedent debt in the form of a personal loan from Judy Jones to Ted Prince in October 1999.

4. On June 26, 2000, the debtors' liabilities totaled $282,035.99, consisting of $62,990.34 in unsecured debt and secured debt of $219,045.65.

5. On June 26, 2000, the debtors' three bank accounts contained $5,595.76, $7,606.48 and $77.62 in cash for a total of $13,279.86.

6. The value of the debtors' residence on June 26, 2000 was $265,000.00.

7. The value of the debtors' personal property on June 26, 2000 was $3,120.00. The court finds that the debtor's testimony as to the value of inventory and tools was not credible.

8. The debtors' assets on June 26, 2000 totaled $281,399.86.

9. As of June 26, 2000, the debtors' liabilities exceeded their assets liabilities by $616.13 and the debtors were insolvent.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The debtors were insolvent on June 26, 2000.

3. The Defendant Judy Jones is an insider of the debtors, as defined by the United States Bankruptcy Code, 11 USC 101 (31) and (45).

4. The Defendant Judy Jones received payment on an antecedent debt in the sum of $7,500.00 within one year prior to the filing of the bankruptcy proceeding at issue while the debtors were insolvent.

5. The Defendant Judy Jones received more than she would have received in this bankruptcy proceeding if the transfers had not have been made, and she received payment of the debt to the extent provided for by the Bankruptcy Code.

6. The payment of the sum of $7,500.00 is a avoidable preferences under 11 U.S.C. §547 of the Bankruptcy Code.

7. Judgment should be entered in favor of the Trustee against the Defendant Judy Jones and her marital community in the sum of $7,500.00 and bear interest at the federal judgment rate from December 19, 2003.

DATED this 10 day of April, 2006.

/s/ Thomas T. Glover
United States Bankruptcy Judge

Presented by:

BISHOP, WHITE & MARSHALL, P.S.

By: /s/ Krista L. White
Krista L. White, WSBA #8612
(206) 622-5306 x 7491
Attorneys for Plaintiff

Honorable Thomas T. Glover
Chapter 7
Trial Date: February 6, 2006

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: THEODORE JACOB PRINCE and DONNA MARIE PRINCE, Debtors.	NO. 01-10030
VIRGINIA BURDETTE, Trustee, Plaintiff v. JERRY JONES and JUDY JONES, husband and wife and their marital community, Defendants.	Adversary No. A02-01071 (Consolidated) **JUDGMENT AGAINST JUDY JONES**

JUDGMENT SUMMARY

Judgment Creditor:	Virginia Burdette, Trustee
Attorney for Judgment Creditor:	Krista L. White of Bishop, White & Marshall, P.S.
Judgment Debtors:	Judy Jones and her marital community

Attorney for Judgment Debtors:	Darrel Lahtinen of the Law Offices of Jean Schiedler-Brown
Principal Judgment Amount:	$7,500.00
Prejudgment Interest at rate of 4.77% per annum from December 19, 2003	$ 846.00
TOTAL JUDGMENT AMOUNT:	$8,346.00

This matter came on for trial in the above referenced action. Virginia Burdette appeared by and through her attorney of record, Krista L. White of Bishop, White & Marshall, P.S. Defendant Judy Jones appeared by and through her attorney of record, Darrel Lahtinen of the Law Offices of Jean Schiedler-Brown. The Court, having previously made and entered its Findings of Fact and Conclusions of Law, now therefore hereby

ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff, Virginia Burdette, Trustee, shall have judgment against Judy Jones and her marital community in the sum of $7,500.00 for a total judgment. Judgment shall accrue interest thereon at the Federal Judgment Rate 4.77% per annum from December 19, 2003 until paid in full.

It is further

ORDERED, ADJUDGED AND DECREED that the Trustee's complaint against Jerry Jones for recovery of the sum of $8,500.00 is hereby dismissed with prejudice and without costs to any party.

DATED this 10 day of April, 2006.

/s/ Thomas T. Glover
United States Bankruptcy Judge

Presented by:

BISHOP, WHITE & MARSHALL P.S.

/s/ Krista L. White
Krista L. White, WSBA #8612
Attorneys for Plaintiff

IN THE BANKRUPTCY COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

In re: Theodore and Donna Prince, Debtor(s).	NO. 01-0030
Virginia Burdette, trustee, Plaintiff v. Tex and Jane Doe Prince, et. al, Defendants.	Adv. No A02-01071 **ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT OR ALTERNATIVELY FOR A NEW TRIAL**

This matter came before the court on Judy Jones' Motion to Alter or Amend Judgment or Alternatively for A New Trial.

The court finds that Judy Jones has failed to establish cause for granting a new trial or for altering or amending the judgment under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. Now, therefore, it is hereby

ORDERED that Judy Jones' Motion to Alter or Amend Judgment or Alternatively for A New Trial is DENIED.

DATED April 26, 2006.

/s/ Thomas T. Glover
Judge Thomas T. Glover
United States
Bankruptcy Judge

Kerry C. Holt,
Law Clerk to the
Hon. Thomas T. Glover

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:	)	
THEODORE JACOB PRINCE and DONNA MARIE PRINCE,	)	No. 01-10030
Debtors.	)	
VIRGINIA BURDETTE,	)	
Plaintiff,	)	
vs.	)	No. 02-01071
TEX PRINCE and JANE DOE PRINCE,	)	
Defendants.	)	

TRANSCRIPT OF THE
DIGITALLY-RECORDED PROCEEDINGS

BEFORE THE HONORABLE
THOMAS T. GLOVER

FEBRUARY 6, 2006

Reported by: Robyn Oleson Fiedler
CSR #1931

* * *

[45] THE COURT: All right. With regard to this matter, the court has certain findings of fact to

make. And really, that's all I'm left with at this point [46] because there's no dispute as to the standard of solvency in a preference action. You know, it's liabilities on the date of the transfer compared to assets at fair valuation. And it's mostly with respect to the assets that we're dealing with here.

First of all – but let me comment on the liabilities. I think that the trustee plaintiff is more accurate with respect to the liability. I'm going to use the higher figure of $62,990 as the credit card debt. The payment or the charges were incurred on the date of the transfer. It seems to me that that – we don't know, you know, instantly whether one was before the other. But it seems to me that you net things out and look at matters on a particular day, that we should use the higher amount. And so that makes the total debt $282,035, I think, if I was adding correctly and following your math, the combination of the credit card debt plus the amount due on the home mortgage at that point in time.

I find that factually, the case ends up a lot closer than I thought. Here is what trouble me. You have a valuation here today based upon a number of comparables, and I don't have any trouble with the record, at $225,000. The debtor valued the house much higher at 245 in the schedules. The debtor has an [47] appraisal of, you know, a higher amount later at 265. The debtor sold the house within, what is it, about a year, it looks like, of the filing of bankruptcy for almost $300,000, which to me indicates a higher value for that particular property.

I'm aware that refinancing appraisals tend to push the number higher based upon the amount that is obtained. It seems to me that under those circumstances, that the debtor really has a pretty good idea of what the value of the property is. And so I'm going to go with the debtor's value of $245,000. I could stretch it up further to 255 toward 265, but I'm not willing to accept that higher number because it is a number based upon financing. But I am leaning that direction more because – you know, than the proximate sale for what, $298,000 that the debtor testified to.

So if we put it at 245, then we have the issue of the property personal and the cash. There's no dispute on the cash at $13,280. The listed personal property is $3,120. I'm not going to go beyond that number.

The debtor's testimony concerning inventory is, at best, murky. He doesn't have any idea of what the inventory is. We go through this stuff about it being stolen later on. He first testified that [48] normally it's not customary within the business that he was doing to have inventory. Then he testified, well, he did have some. And then he testified that some of was sold, and then he testified that it was stolen. None of this I find to be credible evidence. And I'm not going to allow anything for inventory.

As far as personal property is concerned, the debtor's listed the amount that he has. You know, the minute you take stuff out of the store – he doesn't

schedule it anyway, but even if he did, there's a reduction in value. The whole thing with the tools is a mystery to me. I know he says he paid $1,300 for tools. Again, his evidence concerning what he had, his personal property knowledge is that he had a physical condition involving a stroke, he hasn't got a clue. And so I simply can't allow that.

So I find that the debtor indeed was insolvent at the time of the transfer here. And the assets of the debtor at that point in time, based upon a $245,000 value, are $261,400. And that's the 245 for the house plus the $13,000 plus in cash, plus the $3,000.

I've got to say, I even did the math. If you up the price of the house to that $265,000, the debtor is still insolvent. Not by much, by $600 bucks, but, [49] you know, this is a mathematical calculation. That's not my finding. But I'm just telling you that in finding the $245,000 value, I'm aware of the higher value.

So the Court concludes that the debtor was insolvent and that the preference claim is recoverable.

Ms. White, you may present appropriate findings and conclusions or – well, if you want, you can use the Court's oral opinion for that purpose. I'll leave it up to you.

MS. WHITE: Thank you, Your Honor.

THE COURT: I appreciate counsel working it down to the real issue here. I think it makes it

easier on everyone and really focuses where the dispute is.

All right, we'll be at recess.

MS. WHITE: Your Honor, could I just add one thing? It will not change the Court's ultimate decision, but just in case there's any further proceeding on appeal on this, I wanted to make it clear that when the debtor sold the property for $300,000 – that was some three and a half years later – he sold it in April 2004.

THE COURT: All right. Then I need to be – he was hard for me to hear, because he's not very clear

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: THEODORE JACOB PRINCE; DONNA MARIE PRINCE, Debtors.	No. 07-35149 BAP No. WW-06-01181-PaMoS ORDER (Filed Jun. 25, 2009)
JUDY JONES, Appellant, v. VIRGINIA ANDREWS BURDETTE, Chapter 7 Trustee, Appellee.	

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

The mandate is recalled for the limited purpose of considering the petition for panel rehearing. Judy Jones' motion to accept a late petition for panel rehearing is granted. The petition for panel rehearing filed on April 24, 2009, is denied. The mandate shall reissue forthwith.

No further filings, shall be accepted in this closed case.

Supreme Court, U.S.
FILED
DEC - 3 2010
OFFICE OF THE CLERK

No. 09-509

IN THE
Supreme Court of the United States

JUDY JONES,
Petitioner,

v.

VIRGINIA ANDREWS BURDETTE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

JUDY JONES, PRO SE
10809 Nestlenook Circle
Mather, California 95655
(916) 364-7093

QUESTION PRESENTED

Whether the court of appeals erred in according absolute deference to a Bankruptcy Court's internally inconsistent factual findings contrary to the clear error standard set forth in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

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INTRODUCTION

While this Court is not in the business of error correction, it has quite frequently granted summary disposition for those cases where the lower court's decision clearly conflicted with Supreme Court precedent. *See e.g, Wellons v. Hall*, 558 U.S. __ (2010); *Spears v. United States*, 555 U.S. __ (2008); *Moore v. United States*, 555 U.S. __ (2008); *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Lawrence ex rel. Lawrence v. Chater,* 516 U.S. 163, 167 (1996). Here, the Ninth Circuit's decision according the bankruptcy unlimited deference on internally inconsistent factual findings was clearly erroneous in light of this Court's decision in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). For this reason, the Court should grant rehearing and the petition for writ of certiorari.

STATEMENT

1. This case involves the issue of whether a transfer of $7,500.00 from a bankruptcy debtor to the petitioner was an avoidable preference within the meaning of the Bankruptcy Act, 11 U.S.C. § 547(b). Under the Act, any transfer of property is subject to review by a trustee. A trustee may avoid certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition. The trustee's power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps

reduce "the incentive to rush to dismember a financially unstable debtor." *In re Smith*, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), *cert. dismissed, Baker & Schultz v. Boyer*, 506 U.S. 1030 (1992).

Not all debtor transfers of property in the months leading up to filing a bankruptcy petition are covered under the Act. Indeed, section 547(b) provides that a trustee may only avoid a transfer of a debtor interest in property if the transfer meets five requirements: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code.

The trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g). The Bankruptcy Act presumes a debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); *see also, Union Bank v. Wolas,* 502 U.S. 151, 155 (1991). This presumption requires the defendant to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). *See In re Taxman Clothing Co., Inc.*, 905 F.2d 166, 168 (7th Cir. 1990).

Generally, a trustee proves that a debtor was insolvent when the challenged transfer was made by comparing the debtor's liabilities on the balance sheet against the debtor's assets. For example, if a debtor's liabilities were more than the assets at the time of the transfer, the debtor is considered insolvent at the time of the transfer. Also, if the trustee is able to prove that the recipient of the transfer received more on account of the challenged transfer than it would have recovered in a chapter 7 liquidation then the transfer is an avoidable preference.

2. The debtors, Theodore Jacob Prince and Donna Marie Prince, filed a petition for chapter 7 bankruptcy on January 3, 2001. The Bankruptcy Court in Seattle, Washington, appointed Virginia Burdette trustee of the bankruptcy proceedings.

Petitioner Judy Jones (debtor Theodore Prince's sister) loaned debtors $7,000.00 on or around October 11, 1999, because debtors were in financial hardship. Petitioner's husband, Jerry Jones, also loaned the debtors $8,000.00.

The debtors repaid Jerry Jones $8,500.00 on May 15, 2000, but were unable to pay petitioner until June 12, 2000. The $7,500.00 check to petitioner cleared the bank on June 26, 2000, which is significant, given that avoidable preferences are determined based upon the date the check is honored by the bank. *Barnhill v. Johnson*, 503 U.S. 393, 394 (1992).

The trustee began adversarial proceedings against petitioner and her husband to recover loan re-payments on January 28, 2002. Trustee argued that

the payments were preferential transfers under § 547(b) and § 550. During the course of the adversary proceedings, a district court reversed the findings of the Bankruptcy Court, concluding that the debtors were solvent when payment was made to petitioner's husband. Thus, the only issue left to determine was whether the debtors were solvent on June 26, 2000—the day the check payable to petitioner was honored by the bank.

The Bankruptcy Court conducted a trial where the trustee presented the testimony of Michael Peters—a realtor who addressed the value of the debtors' real property. Mr. Prince testified in support of the petitioner and stated that the Bankruptcy Court should include furniture as personal property assets and tools as part of his business inventory.

The Bankruptcy Court issued an oral ruling at the conclusion of trial. The Court determined that the value of the debtors' property at the time of the transfer was $245,000.00. App.31. However, the court later held that the "the value of Debtors' residence on June 26, 2000 was $265,000.00." Pet. App. 21.

The Bankruptcy Court issued supplemental findings of fact and conclusions of law that calculated the debtors' liabilities on June 26, 2000, at $282,035.99. The court calculated the total assets at $281,399.86. Therefore, the court concluded that debtors were insolvent by $616.13 at the time of the transfer and the $7,500.00 check was an avoidable preference. The court then entered a judgment against petitioner.

In a motion for reconsideration, petitioner argued that the debtors' liabilities should have been reduced for a check sent to creditors that cleared the bank on June 19, 2000. Petitioner also argued that debtor's testimony could not reject in its entirety by the bankruptcy court in calculating debtors' assets. But the court denied the motion in a one-page order. Pet. App.27.

3. The United States Bankruptcy Appellate Panel of the Ninth Circuit reviewed the Bankruptcy Court's finding that debtor was insolvent on the date the $7,500.00 transfer was made to petitioner. The court first noted the highly deferential standard of review for findings of insolvency. Pet. App.11. The court concluded that while the lower bankruptcy court had rejected Theodore Prince's testimony in its entirety, the finding was not clearly erroneous even though the Bankruptcy Court had not specifically found that either the inventory or tools did not exist. Pet. App.15-16. The court also held that the Bankruptcy Court had not abused its discretion in denying the motion for reconsideration. Although the invoices tending to show that debtor had at least $6,850.00 of inventory was produced at trial, the court believed that it was immaterial as to whether the debtors were insolvent. Pet. App.16.

A panel of the Ninth Circuit also reviewed the Bankruptcy Court's avoidable preference finding. But the Court did so summarily without benefit of oral argument. The Court agreed that the factual findings by the lower court did not amount to clear error, but the court issued no analysis—only a one-sentence conclusion.

A petition for rehearing was filed, but the Ninth Circuit denied the motion on June 25, 2009.

A petition for writ of certiorari was timely filed but on January 11, 2010, it was denied.

ARGUMENT

The Court should grant rehearing and issue a GVR (grant the writ, vacate the judgment below, and remand the case) order in light of *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) because the lower court's opinions conflicts with that decision.

This Court has on many occasions explained why summary disposition can benefit both the parties and the Court. This Court has noted that in appropriate cases, "a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (quotation and citation omitted). In *Youngblood v. West Virginia*, this Court issued a GVR where the lower court failed to consider a federal due process claim that discovery had been erroneously withheld. 547 U.S. 867 (2006). There, the Court noted that if it was to reach the merits of the case, "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia" on the due process/discovery issue. *Id.* And just this term, the

Court issued a GVR order where the Eleventh Circuit's decision denying federal habeas corpus relief was contrary to *Cone* v. *Bell*, 556 U. S., at ___ (slip op., at 17– 18) (2009). *See Wellons v. Hall*, 558 U.S. __ (2010).

The standard for a GVR order is "appropriate when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellon*, 558 U.S. at __ (quoting *Lawrence* v. *Chater*, 516 U. S. at 167 (1996)). Petitioner can easily meet this standard.

The court of appeals' decision was erroneous for two reasons. First, it confused a clearly erroneous with a never erroneous standard for reviewing factual findings made by a Bankruptcy Court. Contrary to the court of appeals, this Court has always made clear that while factual findings are reviewed deferentially, they are not above all review. Second, the court of appeals failed to justify the Bankruptcy Court's internally inconsistent findings that while the debtors possessed personal property and inventory, the court could not determine the value of the personal property and inventory. Because the court of appeals decision runs counter to well-established decisions from this Court and those below, the Court should grant the writ and summarily reverse the judgment.

1. The standard for appellate review of trial court factual findings has been covered by this Court many times. The Court has made clear that when an

appellate court reviews factual findings, the review is for "clear error." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Clear error review permits only limited reexamination of factual findings where "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 573-74. The reviewing court may reverse, however, when, although there is evidence to support the finding, "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

While trial court's credibility determinations are accorded even greater deference, they are not beyond review. In fact, a trial court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Anderson*, 470 U.S. at 575. Thus, reviewing for clear error allows an appellate court to examine the trial court's credibility determinations in light of the evidence in the record as a whole, in order to determine whether the credibility assessment can be reconciled with other evidence: "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it." *Id.*

Application of the foregoing principles to the facts of this case lay bare the errors committed by the court of appeals in its employment of the clearly erroneous standard. The court treated the factual findings as if they were beyond reproach. Instead of

actually reviewing the factual findings, the court of appeals simply stated that the lower court did not "clearly error by relying on the bankruptcy schedules, rather than Mr. Prince's testimony, to determine the value of Prince's personal property." Pet. App.2.

To be sure, factual findings are reviewed deferentially, but *some* review must be conducted. By failing to review the evidence as a whole, the court of appeals also failed to conduct the review required by this Court's cases. And had the court of appeals conducted the proper review, it would have found that the bankruptcy court's factual findings were internally inconsistent—a paradigmatic example of clear error. *Anderson*, 470 U.S. at 575.

2. The court of appeals also failed to review the bankruptcy court's internally factual findings. After Prince had testified at trial, the bankruptcy court concluded that Prince had some additional personal property and inventory. Pet. App.32. Nevertheless, the bankruptcy court also concluded that Prince's testimony was so "murky" that the court could not determine the amount of the personal property and inventory. The court therefore relied solely upon the bankruptcy schedules.

The Ninth Circuit Bankruptcy Panel acknowledged the bankruptcy court's internally inconsistent reasoning. The Panel stated that "the bankruptcy court did not specifically find that either the inventory or tools did not exist. Rather, the court found that Ted's testimony regarding the tools and inventory was not credible." Pet. App.32. The Panel also acknowledged that the bankruptcy court had a statement in the record showing that debtors

possessed $5,000.00 in inventory on the transfer date. Pet. App.15. Yet, the Panel concluded that the bankruptcy court did not clearly err when it decided to disregard the testimony on personal property and inventory.

The Bankruptcy Court attempted to shield its bogus factual findings under the umbrella of a credibility determination. But this Court has emphasized that trial courts may not "insulate [their] findings from review by denominating them credibility determinations..." *Anderson*, 470 U.S. at 575. Where trial court credibility determinations are internally inconsistent with the rest of the factual findings, clear error has occurred. *Id.* The court of appeals therefore erred in allowing an internally inconsistent factual finding to stand, because the bankruptcy court simply could not conclude that debtors possessed personal property and inventory, but fail to add the property and inventory to the calculation of solvency.

3. Had the court of appeals actually reviewed the bankruptcy court's factual findings for clear error, the result of the insolvency finding would have been different.

Disregarding the debtors' testimony on personal property and inventory, the bankruptcy court determined that debtors' liabilities exceeded their assets by $613.13 when the transfer to petitioner occurred. If the court had attributed just the $5,000.00 record of inventory that was corroborated by debtor's testimony, the debtors were solvent at the transfer date. And if the bankruptcy court believed inventory was possessed, there was unquestionably enough inventory to cover the

$613.13 difference between solvency and insolvency. Ultimately, if the debtors were solvent at the time of the transfer, the transfer was not an avoidable preference.

It is clear that the court of appeals did not consider this Court's precedents (such as *Anderson*) when reviewing petitioner's claim of factual finding clear error. It is also clear that the court of appeals opinion gave short thrift review of the issue. If the Court is to reach the merits of the case, it would be better to have the benefit of full review by the court of appeals, rather than a one sentence analysis. Thus, the Court should grant a GVR remanding the case for a more comprehensive opinion. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I do hereby certify that this petition for rehearing was filed in accordance with Rule 44 and not for delay purposes.

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